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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

JUAN M. GUTIERREZ,

Defendant and Appellant.

B214634

(Los Angeles County
Super. Ct. No. BA334280)

APPEAL from a judgment of the Superior Court of the County of Los Angeles,
Anne H. Egerton, Judge. Affirmed.

Kim Malcheski, under appointment by the Court of Appeal, for Defendant and
Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant
Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Susan D.
Martynece, Supervising Deputy Attorney General, Theresa A. Patterson, Deputy Attorney
General, for Plaintiff and Respondent.

INTRODUCTION

Following trial, a jury found defendant and appellant Juan Gutierrez (defendant) guilty of first degree murder and found true the gang enhancement allegation under Penal Code section 186.22.¹ On appeal, defendant challenges the sufficiency of the evidence in support of the true finding on the gang enhancement allegation, arguing that there was no evidence, other than the expert's speculation, that defendant killed the victim with the specific intent to promote or further criminal conduct by gang members and that there was no evidence that the killing benefited a gang. We hold that the true finding on the gang enhancement allegation was supported by substantial evidence. We therefore affirm the judgment of conviction.

FACTUAL BACKGROUND

Prosecution's Case

A. *Munoz*

On December 16, 2007, at approximately 3:30 a.m., Lester Munoz was working as a security guard at Tommy's Burgers located at 2575 West Beverly Boulevard in Los Angeles (Tommy's). He noticed a group of more than four people talking loudly in the parking lot and they appeared to be "cholos" or gang members. The group went inside Tommy's to order food and came back outside to eat. Then a man from the group went back inside for ketchup. After getting ketchup, the man "started talking to some other person. They were close, as if they were about to fight." Following that encounter, the man rejoined his group outside and started joking with his friends. The other man inside

¹ All further statutory references are to the Penal Code unless otherwise indicated.

Tommy's, whom Munoz identified as defendant,² was with a girl, and Munoz saw them leave together on foot.

A few minutes later, Munoz saw defendant return to the parking lot alone. He went to the middle of the parking lot and shot three times in the direction of the group that had been talking loudly. Munoz was 14 to 15 feet from defendant who had a smile on his face as he was shooting. Defendant was wearing a black sweatshirt with the hood up.³ When he finished shooting he turned, looked at Munoz, and walked away. Defendant had a black, automatic pistol in his hand. He went back around the corner from where he had come.

Munoz testified that a few days before trial, defendant's girl friend, Nadia Gomez, and a man confronted him at work, telling him that everything he said at trial would be written down and they would know about it. Munoz feared for his safety and that of his family due to his involvement in the trial.

B. Marquez

On December 16, 2007, at around 3:30 a.m., Jose Marquez went to Tommy's with three or four of his friends, including the victim, Xavier Calleja. They went inside, ordered hamburgers, and came outside to eat their food at some tables against the wall. At some point, Marquez went back inside Tommy's to get some ketchup. Inside Tommy's, Marquez stepped on "some guy['s] shoes" The man was with a girl. Marquez apologized, but did not remember telling the police in January 2007 that when he apologized to the man inside Tommy's, he said, "I'm sorry for disrespecting your jaina," or girlfriend, nor did he remember telling the police that he shook the man's

² Munoz identified defendant as the shooter at trial and at the preliminary hearing. He also identified defendant in a live line up.

³ Previously, when defendant was inside Tommy's with the girl, the hood to his sweatshirt was down.

hand.⁴ Marquez went back outside and was eating his hamburger when he heard gunshots and “hit the floor.” When he saw that his friend, Calleja, had been shot somewhere in his stomach, Marquez went to help him.

C. Fisch

On December 16, 2007, at approximately 2:45 a.m., Brandon Fisch was eating at Tommy’s with two friends. He had been there about half an hour when he witnessed a shooting. Just before the shooting, he was standing at a counter eating. He heard two gunshots, turned, and saw the shooter, whom he identified as defendant,⁵ fire a third shot. He saw the muzzle flash from the gun. Then he ducked behind a trash can. Defendant was alone wearing a black hooded sweatshirt and had a black semi-automatic handgun. Fisch was about 20 feet from defendant. Fisch saw the victim and a bystander standing over him trying to help him. He saw the shooter turn and run down Beverly, where he passed a building and went out of Fisch’s line of sight. A few seconds later, Fisch saw a black car speeding in the opposite direction.

D. Perez

On December 16, 2007, at approximately 3:30 a.m., Hilario Perez was working as a cashier at Tommy’s. Before the shooting, he saw the group of men come into Tommy’s and order food. The men left to eat outside, but one of them came back for ketchup or chilies. Perez saw the man with the ketchup “greet” another man who said, “Where you

⁴ When Los Angeles Police Detective George Lee viewed the security camera video tape from inside Tommy’s with Marquez shortly after the shooting, Marquez identified the man whose shoe he stepped on as defendant. In addition to apologizing to defendant, Marquez also admitted saying to defendant, “We didn’t disrespect your jaina” and explained that he made that statement because he had been staring at defendant’s girl friend.

⁵ After the shooting, Fisch attended a live lineup during which he identified defendant as the shooter. He also identified defendant as the shooter at the preliminary hearing and at trial.

from?” The man who made that comment was with a girl from whom Perez took an order. The man and the girl then left.

E. Detective Mota

On December 16, 2007, Los Angeles Police Detective Mario Mota was assigned as one of the investigators in the Rampart homicide unit. At the scene of the murder, Detective Mota recovered two shelling casings. He also recovered two copper or brass bullet fragments and one projectile. He thereafter interviewed Perez at the scene that morning and viewed with him a video from Tommy’s security camera depicting some of the events inside Tommy’s prior to the shooting. Perez told Detective Mota that he was working that morning as a cashier when the victim and his friends came inside the order area, or the “order shack.” Perez then saw the man who did the shooting enter with a female. According to Perez, the shooter approached Marquez, reached out, shook his hand, held onto his hand, and asked “Where you from?”

F. Coroner

The victim, Calleja, suffered three gunshot wounds, one to the left arm, one to the upper back, and one “at the buttocks.” The deputy medical examiner who performed the autopsy concluded that Calleja “died as a result of having sustained these multiple gunshot wounds.”

G. Officer Garcia

Los Angeles Police Officer Frank Garcia worked in the Rampart division and, in December 2007, he was assigned to monitor the activities of the Temple Street gang. As part of the investigation into the murder of Calleja, Officer Garcia was asked to view the security video from inside Tommy’s, as well as still photos from that video, depicting some of the events that preceded the shooting. He recognized the girl with defendant in the video as Nadia Gomez, a Temple Street gang member who was known by the nickname “Little One” or “Little Girl.”

H. Officer Purece

Los Angeles Police Officer Brandon Purece was assigned to conduct surveillance on a house on December 28, 2007, in connection with the investigation into the Calleja murder. The house, located at 1821 Montana Street, was the home of Nadia Gomez's family. Officer Purece had been informed by Detective Mota that Gomez and defendant were girlfriend and boyfriend, and that defendant occasionally stayed at Gomez's house.

Officer Purece was "sitting on point," with a view of the front of the house, when he saw defendant and another male walk from the rear of the residence, down the side of the house, and across the front lawn to the sidewalk. Another officer made a radio request for uniformed officers to conduct a stop. Officer Purece was then informed that officers had observed defendant going into a cleaners on the northwest corner of Montana and Echo Park Avenue. When officers ordered defendant and his companion to exit the cleaners, defendant came out, but began to run from the officers. As he ran, he dropped a handgun on the sidewalk.⁶ Defendant continued to run, but uniformed officers were able to detain him. During a search of defendant, Officer Purece recovered what appeared to be marijuana and cocaine.

I. Detective Vasquez—Gang Expert

Los Angeles Police Detective Christopher Vasquez had worked in the field as a gang officer for seven years and had worked the past year as a gang detective. During his career, he had spoken to thousands of gang members and investigated thousands of gang crimes. From 2000 to 2007, he had been assigned to monitor the Echo Park gang. That gang had been in existence since the 1950's, and at the time of trial, it had approximately 120 members. The Echo Park gang's common sign or symbol was a "rhino." Detective Vasquez monitored the activities of the Echo Park gang on a daily basis. He was required to build relationships with gang members and know who they were.

⁶ When the gun, a .357 magnum pistol, was recovered it was loaded, cocked, and ready to fire. The two shell casings recovered from Tommy's parking lot came from that gun.

Echo Park gang members were required to “put in work” on behalf of the gang, i.e., engage in criminal activities such as shootings, beatings, and robberies. Such activity increased the status of the gang and brought in money to buy guns and pay taxes to the Mexican Mafia.

According to Detective Vasquez, respect is very important to gangs and gang members. If a rival gang member came into a gang’s territory and wrote graffiti, that would be a major sign of disrespect. Detective Vasquez was aware of cases where someone looked at a gang member the wrong way and the gang member pulled a gun and shot the person. That kind of conduct elevates a gang member’s status and marks him as someone dedicated to the neighborhood who is willing to do anything for the neighborhood. In a gang, each member wants to promote his status within the gang to acquire more power and to gain the admiration of younger gang members.

Detective Vasquez was aware that the Echo Park gang had an alliance with the Temple Street gang. It was not uncommon to see Temple Street gang members attend parties in the Echo Park gang’s territory. It would not be unusual for an Echo Park gang member to date a Temple Street gang member.

Detective Vasquez was familiar with defendant and had numerous contacts with him. Defendant was an admitted Echo Park gang member with the moniker “Termite” who had several Echo Park gang tattoos.

Detective Vasquez knew that Tommy’s was in the Temple Street gang’s territory. He had seen photographs depicting Temple Street graffiti in the area around Tommy’s taken by the detectives who investigated the Calleja murder. It was part of Detective Vasquez’s job to know the gangs that “got along” with the Echo Park gang and to know the territory of those gangs.

Detective Vasquez was asked the following hypothetical question: “I want you to assume that on December 16th, 2007, at approximately 3:30 in the morning, an Echo Park gang member and a female Temple Street gang member were buying food at a Tommy’s Fast Food Restaurant, which was located in Temple Street gang territory. [¶] Assume that there was a separate group of approximately four males eating at Tommy’s

also. Assume that this group was described as looking like gang members. [¶] One male from that group, who I will call the victim's friend, walked into Tommy's to get some ketchup and stepped on the foot of the Echo Park gang member. This male also looked at the Echo Park gang member's girlfriend who, again, was from Temple Street. [¶] Assume that the Echo Park gang member asked the victim's friend, 'Where are you from?' The victim's friend apologized to the Echo Park gang member and stated he did not disrespect the gang member's jaina, meaning girlfriend. The Echo Park gang member and the victim's friend then shook hands, but it was in an unfriendly manner, it looked as if the two males were going to fight. [¶] Assume that the victim's friend then walked back to his group of friends who were standing and eating. [¶] Assume that the Echo Park gang member left the Tommy's location with the Temple Street girlfriend and then immediately returned. The Echo Park gang member walked towards the group of males, which included the victim's friend who was earlier asked, 'where are you from?' The Echo Park gang member then took a gun out and shot at the group striking and killing the victim. [¶] Do you have an opinion as to whether the gang member, the Echo Park gang member in that hypothetical fact scenario acted with the specific intent to further, assist or promote criminal conduct by Echo Park gang members?"

In response to the question, Detective Vasquez listed certain facts that informed his opinion. The victim was with a group of males who looked like gang members. One member of that group stepped on an Echo Park gang member's foot inside Tommy's and stared at that gang member's girlfriend. Both actions were "disrespectful" to the Echo Park gang member who responded by asking, "Where are you from?" According to Detective Vasquez, that question almost always is a prelude to a shooting or a beating.

Detective Vasquez also emphasized that the incident took place inside Temple Street gang territory, a gang with which the Echo Park gang had an alliance. Thus, it was almost as if the incidents of disrespect took place in the Echo Park gang member's territory. If the Echo Park gang member did not retaliate, he would be looked down upon by his own gang, as well as the Temple Street gang. And, by reacting as he did, the Echo Park gang member promoted his status as a gang member in his territory. The Echo Park

gang member was showing that he would act on any gesture of disrespect made in his territory. Detective Vasquez opined that the Echo Park gang member's "status [within his gang was] going to be promoted tremendously" by the shooting.

Detective Vasquez further explained that a gang considers a member who pulls a gun on someone who disrespects him as a "star." The "ultimate sacrifice" for a gang member is to kill a member of another gang or someone he believes is a member of another gang. Detective Vasquez added that a shooting like the one described in the hypothetical question makes it easier for the shooter's gang to commit crimes in the community because members of the community become aware of it and are intimidated by it. Community members see gang members "hanging out" and are afraid to report crimes because they feared a similar shooting may happen to them or their family.

Defense Case

The defendant did not call any witnesses or present any evidence on his own behalf.

PROCEDURAL BACKGROUND

The Los Angeles County District Attorney charged defendant in an information with the murder of Calleja in violation of section 187, subdivision (a)—a felony. The District Attorney alleged that the offense was committed for the benefit of, at the direction of, and in association with a criminal street gang with the specific intent to promote, further and assist criminal conduct by gang members within the meaning of section 186.22, subdivision (b)(1)(C). The District Attorney also alleged that defendant: personally and intentionally discharged a firearm which proximately caused great bodily injury and death to the victim within the meaning of section 12022.53, subdivision (d); personally and intentionally discharged a firearm within the meaning of section 12022.53, subdivision (c); and personally and intentionally used a firearm within the meaning of section 12022.53, subdivision (b).

Defendant pleaded not guilty and denied the special allegations. Following trial, the jury found defendant guilty of first degree murder and found the gang enhancement and firearm allegations true. The trial court sentenced defendant to a state prison term of 25 years to life on the murder conviction and to a consecutive term of 25 years to life based on the true findings on the firearm allegation under section 12022.53, subdivision (d), for an aggregate sentence of 50 years to life.⁷

Defendant filed a timely notice of appeal.

DISCUSSION

A. Standard of Review

Defendant's challenge to the sufficiency of the evidence in support of the jury's true finding on the gang allegation is governed by a substantial evidence standard of review. "In reviewing [a claim regarding] the sufficiency of the evidence, we must determine "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." [Citation.] "[T]he court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." [Citation.] We "presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.'" (*People v. Davis* [(1995)] 10 Cal.4th 463, 509-510.) If we determine that a rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt, the due process clause of the United States Constitution is satisfied (*Jackson v. Virginia* (1979) 443 U.S. 307, 318-319 [61 L.Ed.2d 560, 573-574, 99 S.Ct. 2781]), as is the due process

⁷ Based on the true finding on the gang enhancement allegation, the court stated that defendant was ineligible for parole for a minimum of 15 years.

clause of article I, section 15, of the California Constitution (*People v. Berryman* [(1993)] 6 Cal.4th 1048, 1083).” (*People v. Osband* (1996) 13 Cal.4th 622, 690.)

B. Sufficiency of Evidence In Support of True Finding on Gang Allegation

Defendant challenges the sufficiency of the evidence in support of the jury’s true finding on the gang enhancement allegation on two grounds. First, defendant contends that there was no evidence to support an inference that defendant killed Calleja with the specific intent to promote or further criminal conduct by gang members, other than the gang expert’s opinion on that issue which was impermissible speculation. Second, defendant argues there was no evidence that the killing was committed for the benefit of a gang because the prosecutor never asked the expert whether the killing benefited defendant’s gang.

Section 186.22, subdivision (b)(1) provides in pertinent part: “[A]ny person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members, shall, upon conviction of that felony, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which he or she has been convicted, be punished as follows: [¶] . . . [¶] (C) If the felony is a violent felony, as defined in subdivision (c) of Section 667.5, the person shall be punished by an additional term of 10 years.”

Section 186.22 is part of the Street Terrorism Enforcement and Prevention Act (STEP Act). (§ 186.20 et seq.; *People v. Gardeley* (1996) 14 Cal.4th 605, 615.) The Supreme Court in *Gardeley* summarized the requirements of section 186.22 as follows: “To summarize, to subject a defendant to the penal consequences of the STEP Act, the prosecution must prove that the crime for which the defendant was convicted had been ‘committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members.’ (§ 186.22, subd. (b)(1) and former subd. (c).) In addition, the

prosecution must prove that the gang (1) is an ongoing association of three or more persons with a common name or common identifying sign or symbol; (2) has as one of its primary activities the commission of one or more of the criminal acts enumerated in the statute; and (3) includes members who either individually or collectively have engaged in a ‘pattern of criminal gang activity’ by committing, attempting to commit, or soliciting *two or more* of the enumerated offenses (the so-called ‘predicate offenses’) during the statutorily defined period. (§ 186.22, subds. (e) and (f).)” (*People v. Gardeley, supra*, 14 Cal.4th at pp. 616-617.)

There was substantial evidence that defendant killed Calleja with the specific intent to promote or further criminal conduct by Echo Park gang members, as well as substantial evidence that the killing benefited that gang. Munoz, the Tommy’s security guard, testified that Calleja’s group appeared to be gang members. Defendant was an admitted Echo Park gang member, and his girlfriend, Gomez, was a member of the Temple Street gang. Those two gangs were allied and members of one gang were often seen socializing with members of the other gang. It was not unusual for a member of one of those gangs to date a member of the other, as defendant and Gomez were doing. And, the incident occurred while defendant and Gomez were together at Tommy’s which is located in Temple Street gang territory.

Marquez, one of Calleja’s friends, stepped on defendant’s shoe inside Tommy’s and stared at Gomez in defendant’s presence. Detective Vasquez explained that each of those transgressions would have been perceived as “disrespectful” by defendant and Gomez and, derivatively, by their respective gangs. Defendant responded by “hitting up” Marquez, asking him “Where are you from?” According to Detective Vasquez, when a gang member asks that question, violence almost certainly follows. Although defendant and Gomez left Tommy’s without further incident, defendant returned within minutes armed with a .357 magnum pistol, approached the victim’s group outside Tommy’s, and fired three times in their direction, fatally wounding Calleja.

Detective Vasquez further explained that due to the alliance between the Echo Park gang and the Temple Street gang, defendant would have been compelled to respond

to Marquez's apparent gestures of disrespect at Tommy's as if they had occurred in the Echo Park gang's territory. His swift and violent response to the gestures supports a reasonable inference that he intended to avenge the purported disrespectful conduct to demonstrate to the community that anyone who conducted himself as Marquez did in either Echo Park or Temple Street territory would pay the ultimate price for his transgression. Thus, the evidence supported a finding that defendant killed Calleja with the specific intent to promote or further the criminal activities of Echo Park and Temple Street gang members.

There was also evidence that the killing was committed for the benefit of the Echo Park gang. Detective Vasquez testified that the killing would make it easier for members of that gang to commit crimes in the community because residents would fear the same sort of retaliation if they showed a lack of respect for the gang by reporting crimes committed by its members. There was also evidence that witnesses who testified at the trial had been intimidated by the killing. Marquez changed his testimony at trial significantly from what he reported to police immediately after the crime, and Munoz—the Tommy's security guard who was confronted at work by defendant's girl friend, Gomez, and another man the week before trial—said he feared for his and his family's safety due to his involvement in the trial. All of the foregoing evidence was sufficient under the applicable legal standard to support an inference that the killing benefited defendant's gang. Accordingly, under the applicable standard of review, we cannot reverse the jury verdict and judgment of conviction.

DISPOSITION

The judgment of conviction is affirmed.

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MOSK, J.

We concur:

TURNER, P. J.

KRIEGLER, J.